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No. 88-1749

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

WILLIAM VELEZ,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER, IN A CASE WHICH IS NOT FACTUALLY COMPLEX AND IN WHICH THE FACTUAL ALLEGATIONS ARE INTERRELATED AND NOT CONTRADICTORY, A GENERAL UNANIMITY INSTRUCTION IS SUFFICIENT TO PROTECT A DEFENDANT'S SIXTH AMENDMENT RIGHTS.

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The respondent State of Connecticut respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Appellate Court's opinion in this case. That opinion is reported at 17 Conn. App. 186 (1988).

JURISDICTION

As is discussed in the argument portion of this brief, infra, the petitioner has failed to demonstrate that a substantial federal question was properly raised and decided by the Connecticut courts. This Court therefore is without jurisdiction pursuant to 28 U.S.C. §1257.

STATEMENT OF THE CASE

The petitioner was charged with two counts of risk of injury to a minor in violation of Conn. Gen. Stat. §53-21 (Pet. at 3) and one count of sexual assault in the second degree.

One risk of injury count alleged that petitioner placed a nine-year-old girl in a situation where her morals were likely to be impaired and did an act likely to impair her health and

morals. The second risk of injury count was identical, except that it pertained to a different child. R. at 2.[1]

The jury was instructed that the risk of injury statute prohibited two general types of conduct: (1) placing a child in a situation and (2) doing an act. They were told that "[p]roof beyond a reasonable doubt that the defendant violates either one or the other or both of the parts of that statute would be adequate to establish the defendant's guilt." Tr. Nov. 13, 1987 at 76. The jurors were told that their verdict had to be unanimous.

As detailed in the Appellate Court opinion, (Petitioner's Appendix at A-1) the general allegations at trial were

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[1] R. refers to the certified record on appeal.

that petitioner took the girls into his bed on separate occasions and touched their genital areas. He had sexual intercourse with the younger child.

REASONS FOR DENYING THE WRIT

1. **This Court lacks jurisdiction as no substantial federal question was clearly raised and decided in the state courts.**

The petitioner has failed to comply with Supreme Court Rule 21.1(h) which required him to specify the stage of the proceedings at which his federal question was raised and the manner in which such question was raised and considered by the state courts. The respondent submits that petitioner's federal claim never was clearly presented to the state courts.

Viewed in isolation, the petitioner's Question Presented (Pet. at i) indicates his claim to be that the

body of Connecticut case law dealing with when a specialized unanimity instruction is required conflicts with federal authority. This claim was never raised before the state courts. At trial, the petitioner did not object to the general unanimity instruction that was given and did not request a specialized instruction. He made no mention of the unanimity issue at trial.

As review of the Appellate Court's opinion reveals (Pet. at A-13), petitioner's claim on appeal was that the giving of a specialized unanimity instruction was required by state law, not that the existing state precedent was incorrect as a matter of federal constitutional law. Even in his petition for certification to the Connecticut Supreme Court, petitioner never

suggested that the controlling Connecticut unanimity cases should be overruled. This question was never raised and decided by Connecticut courts and this Court is without jurisdiction to consider it. Whitney v. California, 274 U.S. 357, 360 (1927).

Although the Question Presented is to the contrary, the text of petitioner's argument suggests that his attack may be directed not to Connecticut's unanimity law as a whole but rather to the Appellate Court's ruling in this particular case. (Pet. at 5). Even in this event, however, petitioner has failed to demonstrate that a substantial federal question was raised and decided below.

As noted, supra, he made no unanimity claim whatsoever at trial.

On appeal, he argued only that a specific unanimity instruction was "constitutionally required" as "jury unanimity is an aspect of due process and, in Connecticut, of the state constitutional right to jury trial." (Def. Brief at 21). The Appellate Court opinion provides no guidance as to what extent, if any, it considered petitioner's generalized "due process" claim as opposed to his claim arising under the Connecticut constitution. On this record it cannot be said that petitioner demonstrated that a substantial federal question was raised and decided by the Appellate Court.

2. The petitioner misstates the factual basis for his claim.

The petitioner's argument appears to be premised upon the assertion that the jurors could have disagreed as to

the acts he committed; some may have convicted him because they believed he had sexual contact with the children while others may have convicted him because he allowed the girls to view a "sexually suggestive" motion picture. (Pet. at 5.) There is no factual basis for this assertion.

Contrary to the statements on pages 3-5 of the petition, the risk of injury counts were not predicated upon the viewing of any film by the victims. The only testimony before the jury relating to a film was that the older child had been watching a "scary movie" on the petitioner's video cassette recorder on several occasions. See State v. Velez, 17 Conn. App. at 193, n. 5; Pet. App. at A-8, A-9; trial transcript at 66. The jury never viewed any portion of the

film and the jury charge in no way reflected that the film could constitute the basis for criminal liability. As the Appellate Court opinion makes clear, the only predicate for the risk of injury charges was the petitioner's sexual contact with the victims. Pet. App. at A-13, A-15 to A-16.

3. The Appellate Court decision does not conflict with the decisions of this Court or the federal courts of appeal on the issue of jury unanimity.

Although this Court has made clear than conviction by a non-unanimous, six person jury deprives a state defendant of his right to trial by jury as guaranteed by the Sixth and Fourteenth Amendments, Burch v. Louisiana, 441 U.S. 130 (1979), no specific procedural requirements have been imposed on the states to implement this guarantee in

particular factual circumstances.

Specifically, this Court has not addressed the issue of what unanimity instruction is required when a single criminal code section prohibits several types of conduct. The respondent suggests that any bright - line resolution to the issue is impossible, as it must be resolved on a case-by-case basis in light of the legislative history, language, and state court interpretation of the statute in issue. It also must turn on the evidence presented to the jury in a given case.

Several federal circuit courts of appeal have considered the issue in general terms, and there appears to be no conflict among the circuits or between the Connecticut and federal courts regarding the general principles

applicable to its resolution. In United States v. Gipson, 553 F.2d 453 (5th Cir. 1977), the court premised the need for a specialized unanimity instruction on whether the different statutory prohibitions were conceptually distinct; if one act by a defendant can be characterized by different jurors as violating different statutory provisions, the provisions are not sufficiently conceptually distinct to require a specialized instruction. Gipson, at 458. The purpose of a unanimity instruction is to ensure the jurors agree regarding the general factual basis for conviction; it is not to permit a defendant to avoid conviction merely because the jurors agree as to the conduct committed but disagree as to how such conduct should

be characterized within the statutory frame work. Id.

So long as the different bases for criminal liability contained in the statute are not inconsistent and the factual allegations are not unduly confusing, a general unanimity instruction has been regarded as sufficient. United States v. Ryan, 828 F.2d 1010, 1019 (3rd Cir. 1987); United States v. Schiff, 801 F.2d 108, 114 (2d Cir. 1986); United States v. Ferris, 719 F.2d 1405 (9th Cir. 1983).

Although Connecticut courts have ventured no opinion as to whether the Gipson holding is constitutionally required, the Gipson analysis has been regarded as analytically useful and has been implemented in our unanimity cases. See State v. Jones, 193 Conn. 70, 475

A.2d 1087 (1984); State v. Benite, 6 Conn. App. 667, 673-74, 507 A.2d 478 (1986).

The Appellate Court applied the Gipson analysis appropriately in the instant case. The court considered the two general types of behavior prohibited by the risk of injury statute: creation of a situation inimical to the minor's welfare and acts directly perpetrated on the minor and injurious to her. Viewed in light of the specific evidence presented in this case, the allegations were found to comprise only one course of conduct and not two separate actions that were conceptually distinct.

The allegations were that petitioner took two young girls into his bed on separate occasions and partially undressed them. He displayed his penis

to one girl and touched her vagina. He did these things to the second girl and also had sexual intercourse with her. The jury could find that the petitioner violated the risk of injury statute either by placing each victim in a situation likely to impair her morals or by doing an act likely to impair morals.

In these circumstances, the jury had to determine only whether the defendant engaged in one course of conduct, sexual activity with a child, which could then be allocated by jurors to one or both statutory subsections. This matter concerned a characterization issue, not a unanimity question, and there was no need for a specialized unanimity instruction. The Appellate Court opinion does not conflict with the decisions of the courts of appeals and

did not infringe the petitioner's right to trial by jury.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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